No. 06-___

IN THE

Supreme Court of the United States

ROBERT M. SCHARRINGHAUSEN,
Defendant/Petitioner,

v.

UNITED STATED OF AMERICA,
Plaintiff/Respondent.

Appeal of Denial of Motion for Relief from Default Judgment to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether boilerplate allegations in a complaint that a taxpayer was a responsible person who willfully failed to pay over federal employment taxes are sufficiently certain to be taken as true upon default.

2. Whether a "presumption of correctness" arises as to Certificates of Assessment offered in support of a default judgment where the Department of Justice fails to introduce evidence of mailing at a default prove up hearing in District Court.

3. Whether a litigant's reliance on his attorney's advice to submit an offer in compromise to the IRS after being served a summons and complaint by the Department of Justice instead of filing a responsive pleading, is culpable conduct barring relief from a default judgment when the IRS receives the offer before the entry of default.

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OPINIONS BELOW

The opinion of the United States district court denying the defendant's motion for relief from default judgment appears at Appendix A and is unpublished.

The opinion of the United States district court granting the plaintiff's motion for entry of default judgment appears at Appendix B and is unpublished.

The opinion of the United States court of appeals denying defendant's appeal of the district Court's denial of the motion for relief from default judgment appears at Appendix C to the petition and is unpublished.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1). The district court had subject matter jurisdiction over the underlying action pursuant to 26 U.S.C. §§ 7402 and 28 U.S.C. §§ 1340 and 1345. The Ninth Circuit Court of Appeals had jurisdiction of the appeal under 28 U.S.C. § 1291.

On March 7, 2007, the United States Court of Appeals for the Ninth Circuit filed and entered judgment in this case. No petition for rehearing was filed.

STATEMENT OF THE CASE

The default judgment which the United States' secured in the amount of $488,307.96 against the petitioner, Robert M. Scharringhausen on November 3, 2004, reeks of prejudice.

Between 1980 and 2004, IRS transcripts for Mr. Scharringhausen show no tax liability except for income taxes in the amount of 1991 and 1992, which combined, came to $9,837.00 before interest and penalties, and for Trust Fund Recovery Penalties (TFRP) for unpaid federal employment taxes for the third and fourth quarters of 1990 for Scharringhausen Inc., and the second and third quarters of 1991 for Pantera Construction, Inc. The principal balance for 1990 was $145,579.46. The principal balance for 1991 was $56,469.89.

Although ostensibly irrelevant to the default judgment, the fact of Mr. Scharringhausen's 1996 conviction on three counts of bankruptcy fraud pervades these legal proceedings as does the 2002, IRS examination of Mr. Scharringhausen's 1999 and 2000, tax returns. According to the IRS, the 2002 investigation was prompted by the fact that Mr. Scharringhausen had a credit card issued from a bank in the Cayman Islands.

The IRS' "Offshore Credit Card Project" (OCCP), identified American taxpayers by name, and if associated with reputed "tax havens," investigations ensued. Despite the fact that millions of dollars were spent on this initiative, Pamela J. Gardiner, Acting Inspector General, for Tax Administration, testified before the U.S. Senate, Committee on Finance, on July 21, 2004, of the "mixed results" of the IRS' OCCP. According to Ms. Gardiner, the vast majority of the more than 3,000 completed cases were closed without an assessment of any additional taxes.

In late 2002, the IRS issued numerous third party summonses, again ostensibly relating to the determination of Mr. Scharringhausen's correct federal tax liabilities for the years 1999 and 2000.

Mr. Scharringhausen's attorney at the time, William J. Hartsock, moved to quash the summonses and in support of his opposition he filed a declaration with the Court in the USDC Case No. 02-CV-02076. Mr. Hartsock stated that in his meeting with IRS revenue agent, Huong Phan on September 26, 2002, Ms. Phan referred to Mr. Scharringhausen's conviction, "badges of fraud" and that her feeling was the audit "may go criminal."

The DOJ assigned attorney Norma Schrock, a trial attorney for the Tax Division to quash the summonses. The summonses' were quashed and some two months later, on March 20, 2003, Ms. Schrock filed the complaint to reduce federal tax assessments to judgment, USDC Case No.03CV0551-K-RBB, which is the subject of this appeal.

On or about April 9, 2003, prior to the date the government served the complaint on Mr. Scharringhausen, Attorney David Greenberg requested tax information for the years which are the subject of the complaint.

On April 11, 2003, the DOJ served the summons and complaint on Mr. Scharringhausen and he forwarded these to Mr. Greenberg.

On or about May 5, 2003, attorney David Greenberg informed the IRS he was going to be representing Mr. Scharringhausen regarding all tax matters relating to the tax years 1990-2004, for personal income taxes and for the years ending 12/31/90 and 09/30/91 for Trust Fund Recovery Penalties.

The IRS responded to Mr. Greenberg in a letter dated May 8, 2003, and received notice that Mr. Greenberg was representing Mr. Scharringhausen five days before any responsive pleading to the complaint had to be filed and almost two months before the Department of Justice (DOJ) filed the Request for Entry of Default on July 3, 2004.[1]

Although he was aware that Mr. Scharringhausen was concerned about the lawsuit, Mr. Greenberg, told Mr. Scharringhausen that there was nothing he could do, that the money the government alleged in the complaint that Mr. Scharringhausen owed could be included in an offer in compromise and that the lawsuit was the IRS' way of being able to continue to try to collect the amounts allegedly owed.

On May 15, 2003, Mr. Scharringhausen provided Mr. Greenberg with a draft of an Offer in Compromise (the Offer) and on or about May 19, 2003, Mr. Scharringhausen mailed the Offer and included the amounts alleged to be owed in the complaint, as well as the tax years 1997, 1998.

On or about June 4, 2003, the IRS erroneously returned the Offer to Mr. Scharringhausen stating that their records showed he had not filed returns for 1997 and 1998.

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[1] Mr. Greenberg is listed on Civil Case Docket Sheet as an attorney for Mr. Scharringhausen, in USDC 03-CV-0551-K-RBB but was never served any pleadings by the Department of Justice.

On or about June 12, 2003, Mr. Scharringhausen responded to the IRS that in fact he had provided them everything they needed in his initial Offer.

On or about July 1, 2003, the IRS acknowledged receipt of the Offer again with a letter to Mr. Greenberg and Mr. Scharringhausen.

On July 3, 2003, Norma Schrock, who admitted to having "certain" administrative files of the IRS on Mr. Scharringhausen moved to request an entry of a default against Mr. Scharringhausen on the same tax matters that were the subject of the Offer.

On July 7, 2003, Mr. Scharringhausen returned a copy of the July 1, 2003, IRS letter to the IRS. He did not hear from the IRS again until September 16, 2003, when the IRS indicated that "*other investigations are pending that may affect the liability sought to be compromised or the grounds upon which it was submitted*"[2]

In an order dated September 23, 2003, the District Court denied the government's motion for entry of default judgment because the government failed to provide sufficient documentation of the damages. In fact, the Certificates of Assessment which the government submitted in support of its first motion fc default judgment were for tax years 1988, 1989, and 1990 for individual income.

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[2] In *Federal Tax Collections, Liens, and Levies*, by William D. Elliott, 2d Ed., 2004 Cum. Sup. No. 2, page S-22-41 ¶ 22,08, the author notes in relation to an Offer in Compromise where a referral is made to the IRS' Criminal Investigation unit, and a "criminal case is accepted, the examining officer is instructed to not contact the taxpayer regarding the status of the offer until after Criminal Investigation has informed the taxpayer of the fraud investigation. After this has been done, the taxpayer should be informed that: 1. The offer will be rejected because *other investigations are pending that may affect either the liability sought to be compromised or the grounds on which it was submitted* or . . ."

This is interesting only because Mr. Scharringhausen later discovered through a Freedom of Information Act Request that the DOJ knew at the time it filed the complaint, in March 2003, but failed to ever inform any Court, that it had no administrative file from the IRS on which to base its allegations for the TFRP for 1990, because they had been destroyed.

On or about October 10, 2003, the government notified Mr. Scharringhausen that they were moving to enter default judgment for a second time. Mr. Scharringhausen forwarded this pleading as he had done with the summons and complaint to Mr. Greenberg.

On or about December 3, 2003, the government mailed post-judgment discovery which Mr. Scharringhausen forwarded with responses to David Greenberg.

In March 2004, the government notified Mr. Scharringhausen that it was seeking to compel responses to the post-judgment discovery and asking for an award of costs at a hearing set for April 10, 2004, which was continued until April 19, 2004.

Following receipt of the government's motion Mr. Scharringhausen contacted another attorney, Ezekiel Cortez as Mr. Greenberg indicated he was not going to appear at the April 19, 2004, hearing.

At the April 19, 2004, hearing Mr. Cortez, specially appeared for Mr. Scharringhausen before the magistrate and explained that he was appearing because:

> MR. CORTEZ: . . . I represented Mr. Scharringhausen years ago in a federal prosecution where he was acquitted, partly. And late, arising from a separate IRS inquiry, there were issues regarding whether there was a fraud investigation afoot, and whether he could be the subject of yet another indictment.

Mr. Cortez, went on to explain:

> Without violating attorney/client privilege, I can tell you that when I first encountered this issue, he was lost. I guess he didn't have a clear direction as to what was happening. The Fifth Amendment issue has surfaced within the past two and a half weeks, so it hasn't been an issue that's been there lingering and no one looked at it and decided to a waive it by default. In fact, the Fifth Amendment issue wasn't even perceived by Mr. Greenberg, because that's not his speciality. I saw it instantly regarding some recent developments.

On July 9, 2004, Mr. Scharringhausen served responses to the government's December, 2003, post judgment interrogatories and requests for production of documents and asserted the Fifth Amendment to most of the requests.

By October 2004, a hearing was held where the Magistrate denied the government motion for an order holding the Fifth Amendment had been waived, upheld the Fifth Amendment to some requests and granted the government's motion to compel the production of documents and responses to interrogatories to remaining requests.

Mr. Scharringhausen timely filed a motion for relief with a new judge as Judge Judith Keep, who had been assigned to the case and had granted the motion for entry of default and the default judgment, had passed away.

On January 5, 2005, the Court denied Mr. Scharringhausen's motion for relief stating Mr. Scharringhausen's culpable conduct had lead to the default, that he failed to assert a meritorious defense and that the government would be prejudiced by reopening the action.

Mr. Scharringhausen filed a timely appeal to the United States Court of Appeal for the Ninth Circuit. On March 7, 2007, the Court of Appeal found that the denial of the Rule 60(b) motion was not an abuse of discretion.

REASONS FOR GRANTING THE PETITION

In 1996, Congress amended section 26 U.S.C. § 6672 to require the agency to issue a preliminary notice to the taxpayer before imposing an assessment. (See Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 901(a), 110 Stat. 1452, 1465 (1996) (codifying notice requirement at 26 U.S.C. 6672 (b)). In testimony before Congress, Nina Olson, the National Taxpayer Advocate, noted that "institutional tendencies" of the IRS prior to 1998 and lingering today, can lead to a "death by a thousand cuts" and "pendulum swings," whereby the public comes to perceive the IRS as caring "more about enforcement results than about helping taxpayers become or remain in compliance with tax laws." (See The National Taxpayer Advocate's (NTA) Fiscal Year 2005 Objectives Report to Congress, pages 1 and 2).

The NTA also reported to Congress that "The IRS has had difficulty in administering this program since its inception. This is due in part, to the Service's underlying uneasiness about permitting a taxpayer to be relieved of a legally due tax." (NTA 2005 Report page 7) and citing "A 2003 IRS focus group which found that *'virtually all the practitioners believe that the Offer in Compromise program is not working.*" (NTA 2005 Report, page 8, footnotes 12 and 13) (Emphasis Added).

Putting aside the fact that Mr. Scharringhausen discovered through the Freedom of Information Act subsequent to filing his appeal with the Ninth Circuit that the DOJ knew several months before it ever filed the complaint in March 2003, that they had no administrative file for the year 1990 because it had been destroyed, and putting aside the fact that the DOJ submitted declarations to the District Court which stated that it had reviewed administrative files when no such documents existed for 1990, and putting aside the fact that the DOJ stated in its declarations to the Court that Mr. Scharringhausen was liable for the TFRP and interest, when it was held

in *Williams v. United States*, 939 F.2d 915, 916 (1991), that "under §§ 6672, responsible persons may be liable for a 100 percent penalty for withholding taxes not paid by their corporation, but not for penalties *and interest assessed against the corporation for failure to pay withholding tax*," (Emphasis Added), the problem with the way this default judgment was secured is the facade of legal propriety and lip service given to the principles of law and equity.

Set against the backdrop of the facts and circumstances leading up to the filing of the complaint and with nothing more than boilerplate allegations stated in the complaint the DOJ created the illusion that it had a well plead complaint, supported by Certificates of Assessment (4340's) and declarations in a proper format.

However, the reality is that the boilerplate wording in the complaint referring to Mr. Scharringhausen as being a "willful" and "responsible" person liable for the TFRP and the 4340's are insufficient to sustain the default judgment.

1. The Complaint is not Well Plead

The question of whether a default judgment is fair relates to the sufficiency of the allegations in the complaint. As the Supreme Court stated in what is referred to as the "venerable but still definitive case" of *Thomson v. Wooster*, 114 U.S. 104 (1884), "a default judgment may be lawfully entered only 'according to what is proper to be decreed upon the statements of the bill, assumed to be true,' and not "as of course according to the prayer of the bill.'" *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200 (5th Cir. 1975).

While the general rule cited in support of a default judgment is that the entry of default functions as an admission of the plaintiff's well pleaded allegations of fact, *Daning v. Lavine*, 572 F.2d 1386 (9th Cir. 1986), questions remain. What is well pleaded? What is proper to be decreed? What

is an allegation of fact? In *Ohio C. R. Co. v. Central Trust Co.*, 133 U.S. 83, 91 (1890) this Court addressed that issue:

> If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof. But in either event, although the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree.

In *Clifton v. Tomb*, 21 F.2d 893, 897 (1927) the Court further explained that:

> A bill pro confesso, when confessed by the default of the defendant, is taken to be true in all matters *alleged with sufficient certainty*; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant. Thomson v. Wooster, 114 U.S. 104 (1884) *in respect to matters not alleged with due certainty, or subjects which from their nature require an examination in detail, the obligation to furnish proofs rests on the complainant.* (Emphasis Added).

In the dissenting opinion, in *Artesia Ready Mix Concrete, Inc.*, 339 N.L.R.B. 1224, 1228-29 (2003) (dissenting opinion Schaumber) it was noted that the requirement of having "well pleaded", allegations is not an "archaic holdover[ ]from the common law or legal niceties that can be dispensed with when it is convenient to do so:"

> While '[a] default judgment is unassailable on the merits, [it is so] ***only so far as it is supported*** (emphasis added) by *well pleaded* allegations assumed to be true.', (emphasis in original). Conversely, claims that are not well pleaded cannot support a default judgment. (internal

> citations omitted). [T]he Supreme Court and the lower federal courts have consistently held that "the binding character of the decree . . . renders it proper that this degree of precaution be taken."

"On appeal, the defendant, although he may not challenge the sufficiency of the evidence, is entitled to contest the sufficiency of the complaint and its allegations to support the judgment." *Artesia* at 1228-29 citing *Nishimatsu*, *Ohio C. R. Co.*, and *Thomson*.

Here, the boilerplate language in the complaint alleging that Mr. Scharringhausen "was responsible for collecting taxes" and that he "willfully failed to collect" and pay the United States for 1990 and 1991 fall short. An initial question is do these statements pass as "distinct and positive," so that they may be taken as true without proof?

2. Circuit's Are Split on the Element of "Responsibility" under 26 U.S.C. §6672

Under federal law there is a split in the circuits as to when a person is considered "responsible," for purposes of the requirements of 26 U.S.C. § 6672. In *Bradshaw v. United States*, 83 F.3d 1175, 1178 (1995), the government argued that whether a person was or was not a responsible person is a question of law. The 10th Circuit resolved this in *Taylor v. Internal Revenue Service*, 69 F.3d 411 (1995) (10th Cir. slip op. at 7), where the Court held "that the ultimate determination whether an individual is a 'responsible person' within the meaning of 26 U.S.C. 6672 involves an application of law to fact which is subject to *de novo* review on appeal."

The *Taylor* court noted that this holding "agreed with the views of the Second and Eleventh Circuits, but that the First, Fifth, Sixth, Seventh, and Ninth Circuits "treat the issue of responsibility under 6672 as a question of fact and apply the clearly erroneous standard of review." (Citations omitted). This split results in an unfair application of the TFRP because

some circuits find the question as one of mixed law and fact while others simply accept it as a question of fact. The result of this unfairness is that in circumstances such as this, if the Court believes a boilerplate allegation that one is "responsible" for TFRP is deemed to be true, then there is no need for any proof of this element at a prove up hearing on the request for entry of default judgment. However, in circuits where the question is one of an application of law to the facts, the boilerplate reference would be insufficient and require the DOJ to either allege specific facts in a complaint or establish at a prove up hearing the factual basis for the allegation, such as the documentation that is supposed to exist in the IRS administrative files. Indeed, the Internal Revenue Manual, Part 5, Chapter 7, Section 6, subsection 5.7.6.5, notes that "Adequate supporting documentation must be contained in the file(s) to fully support all recommendations for assertion."

Even assuming it is a question of fact this complaint does not meet the requirement of well pleaded allegations because the complaint is simply boilerplate and fails to allege what the IRS did in its administrative process, according to its procedures, to reach the conclusion of fact as to responsibility. Otherwise the matter of responsibility simply is not alleged with the requisite "due certainty." In fact, a default judgment for taxes in the amount of almost a half a million dollars has to be a subject which requires an examination in detail because the District Court required the government to show how it determined the amounts it alleged Mr. Scharringhausen owed. Had the District Court been informed that the DOJ had no administrative file for 1990 and therefore no supporting documentation for the assertion that Mr. Scharringhausen was found by the IRS to be the person responsible for paying the federal employment taxes, clearly the outcome would have been different.

3. "Willfulness" under 6672 must Be Established by Circumstantial Evidence

As for the allegation on the element of "willfulness" under the 6672, although an undisputed question of fact when well plead the question is whether simply alleging one is "willful" is "well plead." Under Wooster the boilerplate allegation that Mr. Scharringhausen was "willful" in failing to pay the federal employment taxes is assailable on the merits because this conclusory statement is not supported by any facts in the complaint. Therefore, it is not assumed to be true on default. In particular the allegation that one was "willful" in not paying the federal employment tax is insufficient pleading because "willfulness" is not "generally amenable to direct proof and must be shown by *circumstantial evidence*." *Wilson v. United States*, 250 F.2d 312, 325 (1957). (Emphasis Added).

Here, the complaint failed to allege the essential facts of willfulness with"due certainty," as there was no showing by the government at a prove up hearing of any circumstantial evidence, again what should have been in the IRS administrative file, to establish Mr. Scharringhausen "willfully" failed to pay taxes, even if he was responsible.

The complaint is not well plead as to this element because it does not allege that the IRS followed its procedures, conducted interviews, or documented any facts to reach the conclusion that Mr. Scharringhausen was "willful" in not paying taxes.

Having failed to take the precaution at the default prove up hearing to require the DOJ to present support for the allegations of willful and responsible, the District Court entered judgment against Mr. Scharringhausen on a complaint that did not allege with due certainty the grounds for liability and the subject of this complaint, a large monetary sum, requires by its nature an examination in detail, especially in light of

the fact that the agency alleging the deficiency has a history of taxpayer abuse and it came to light after the fact, that the IRS did not even have an administrative file for 1990, and never disclosed this to the Court.

4. The Government Made a Naked Assessment

"In an action to collect a tax, the government bears the initial burden of proof. The assessment of tax ordinarily establishes the government's prima facie case, so it becomes incumbent on the taxpayer to establish an issue of fact." *Jones v. United States*, 60 F.3d 584, 589 (1995). Although 4340's are usually considered prima facie evidence of the assessment:

> [w]here the official certificates do not support the proposition which must be proved, however, and lend themselves to an inference that the proposition is false, then the existence of official certificates does not suffice for summary judgment. One must read the official documents to see what they say. It is insufficient merely that they exist. *Jones* at 590.

Moreover, under 26 USC section 7491(c) "Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty . . ." Here the government secured the judgment against Mr. Scharringhausen without ever having introduced a single shred of substantive evidence, and had they been put to the test, it would have come to light that they had no evidence whatsoever from the administrative file of the IRS for 1990.

The cornerstone of the government's case and the basis ultimately for the Court granting the motion to enter a default judgment rested on declarations of the government and Certificates of Assessment (4340's). Under *United States v. Janis*, 428 U.S. 433, 440-41, (1933) assessments are, "when properly certified, . . . presumptively correct evidence of a

taxpayer's liability and satisfies the government's burden of proof." But this "presumption" did not arise, nor can it be relied on to establish that a person is "willful" and "responsible" under 26 U.S.C. § 6672 to prove liability for a penalty without a factual foundation. ("a presumption of correctness attaches to the Commissioner's assessments for unpaid taxes so long as they are 'supported by a minimal factual foundation,'" *Palmer v. United States Revenue Service*, 116 F.3d 1309, 1312 (9th Cir. 1997).

The factual foundation for the assessment is laid "once some substantive evidence is introduced demonstrating that the taxpayer received unreported income." *Edwards v. Commissioner*, 680 F.2d 1268, 1270 (9th Cir. 1982) (per curiam).

In *Weimerskirch v. Commissioner*, 596 F.2d 358, 361062 (9th Cir. 1979) the government assessed deficiencies against an individual based on the allegation that he had unreported income from the sale of drugs. However, "[t]he government offered no evidence, . . . showing that Weimerskirch had ever sold any heroin, or that he had received any unreported income. As a result, in *Weimerskirch* the government could not simply rely on the "presumption of correctness."

Here, not only was there no factual foundation laid out in the complaint alleging why it was that Mr. Scharringhausen was a willful and responsible person responsible for almost a half a million dollars in penalties and interest, but the 4340's did not establish that notice and demand had in fact been sent and made.

For a clear example of the illusion created by the DOJ, the Court will only need to look at the declaration of DOJ attorney Norma Schrock in support of the United States' Motion for Default Judgment. Schrock states that "The Certificates of Assessments and Payments offered by the United States in conjunction with this motion are . . . the proper means of establishing the facts of the administrative

assessment, and notice and demand for payment." Ms. Schrock cites the District Court in stylized fashion, to *"Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (Form 4340's are proof that proper notices were sent); *Hughes v. United States*, 953 F.2d 531, 539-40 (9th Cir. 1991)."

Review of *Hansen* and *Hughes* on this point of law however show they rely on *United States v. Zolla*, 724 F.2d 808, 809 (1984). Zolla adopted the view of the Court in *United States v. Ahrens*, 530 F.2d 781, 784-86 (8th Cir. 1976) which stated that as to this particular point of law, notice and demand, the IRS meets its burden and gains the benefit of a presumption not by simply offering 4340's but when:

> The government submitted *postal form 3877* certifying that the notices of deficiency *had been mailed* and an IRS form certifying that the taxes and the section 6651(a)(3) 1 failure-to-pay penalties had been assessed. Zolla offered no contrary evidence. (Emphasis Added).

In *Zolla*, at 809, the Court explained *when* a "presumption of correctness" arises:

> This court has held that no *presumption of correctness* attaches to deficiency determinations in which the IRS charges a taxpayer with additional income but provides no factual showing that the taxpayer actually received the income in question. To give effect to the presumption in such circumstances would impose on the taxpayer the difficult task of proving a negative.

Here, there was no *presumption of correctness* that the penalties to be paid by Mr. Scharringhausen, were his burden simply by the fact that the District Court accepted the 4340's. Having failed to allege in the complaint that it had in fact proof of the mailing in the form of the 3877, the complaint was deficient.

That this would be required on the default prove up is again evidenced by the fact that the District Court required

the DOJ to submit the 4340's. If it was important for the Court to be shown evidence at the prove up of the accrual of interest and penalties, it would be equally important for the Court to have proof that the notice and demand was sent. The DOJ did not point out to the Court that the 4340's do not establish the fact of notice and mailing and the Court simply accepted the 4340's as proof of deficiency being assessed and for the fact that notice and demand had been made.

To give effect to the presumption of correctness in the circumstances of a default judgment and not require the government to produce Form 3877 certifying that the notices of deficiency *had been mailed*, the District Court, gave the government a default judgment on a complaint that was not well plead. The default judgment in this case is devoid of any foundation as to willfulness and responsibility for the TFRP and devoid of any foundation as to the actual mailing of notice. Therefore Mr. Scharringhausen did raise a meritorious defenses.

5. The Circuits Are Split on "Culpability" in the Context of a Rule 60(b) Motion

As Justice O'Connor stated in her dissent in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. P'ship*, 507 U.S. 380, 403 (1993), joined by Justices, Scalia, Souter and Thomas "it is quite unnatural to read the term 'excusable neglect' to mean a variety of neglect that, in light of *subsequent* events *and* all the equities, *turns out to be excusable*." (Emphasis Added). Justice O'Connor points out that the circularity of this approach and that "excusable neglect becomes the neglect that the court in its equitable discretion chooses to excuse." Following *Pioneer*, the Courts have been in disarray over the concept of excusable neglect and Justice O'Connor's observation was prescient.

Even after the Supreme Court addressed the concept of "excusable neglect" in *Pioneer* where it was stated that "at

least for purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence," the Court of Appeal for the Sixth Circuit in *American Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 60 (1996), set out the split amongst the Circuit Courts as to the meaning of "willful" as it relates to the consideration of "culpability" and "excusable neglect," in the context of a Rule 60(b) motion.

The Third Circuit has held that a Rule 60(b)(1) motion to vacate will be denied only on a showing of "culpable conduct," defined as "actions taken willfully or in bad faith." *Gross v. Stereo Component Systems, Inc.*, 700 F.2d 120, 123-24 (3d Cir. 1983), (requiring more than the "gross—*almost* willful neglect" (Emphasis in Original).

The Sixth Circuit followed the Third in requiring some showing of "culpable conduct *United Coin Meter Co., Inc. v. Seaboard Coastline Railroad*, 705 F.2d 839, 844-45 (6th Cir. 1983). (Declining to define that phrase precisely, but stating in *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 195 (6th Cir. 1986) that "to be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings."Id. at 194).

American Alliance noted that other circuits "in contrast, expressly refuse to vacate default judgments occurring as a result of attorney carelessness." (Citing *Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994) (Relief from default will only be granted "where the actions leading to the default were not willful, careless, or negligent."); *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 64 (5th Cir. 1992) (focus on "neglect or culpable conduct . . . more consistent with rule 60(b)" than focus on "willfulness"); *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th Cir. 1976) (per curiam) (failure of insurance company to communicate with defendant three weeks after receiving copy of

complaint suggests "absence of minimal internal procedural safeguards" and is not excusable neglect); *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (delay due to numerous forwardings not excusable neglect), *Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (misplacement of complaint by mail clerk not excusable neglect); *Pelican Production Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990) ("carelessness by a litigant or his counsel does not afford a basis for relief under Rule 60(b)(1)," albeit in a case in which the party failed to provide any explanation for its previous lawyer's failure to answer the motion to dismiss.).

The Ninth Circuit defines "culpable conduct" for Rule 60(b) purposes "as conduct for which there is no explanation of default inconsistent with a devious, deliberate, willful, or bad faith failure to respond."

This wide discrepancy in defining what is "excusable" and by extension "culpable" conduct makes no sense, especially in light of the policy considerations which though lofty sounding and often cited, seldom, if ever carry the day. Though lip service is paid by the Ninth Circuit, to the "important policy considerations," that are to guide a district court judge's discretion on a Rule 60(b) motion, (*Schwab v. Bullock's, Inc.*, 508 F.2d 353 (1974) (motion to vacate a default judgment remedial in nature and therefore must be *liberally applied*; default judgments are *generally disfavored*; *whenever* it is reasonably possible, *cases should be decided on their merits*; "where timely relief is sought from a default judgment and the movant has a meritorious defense, *doubt, if any*, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits"); ("this Court has emphasized that such judgments are '*appropriate only in extreme circumstances*; a case should, whenever possible, be decided on the merits'" *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (2001)).

In this case, Mr. Scharringhausen produced two declarations from his attorney Mr. Greenberg explaining the reasons that lead to the default judgment. The District Court ignored them. Mr. Scharringhausen also submitted a declaration explaining the circumstances leading up to the default. This was ignored as well. Mr. Scharringhausen pointed out the facts and circumstances surrounding the case at the time which raised the question of Fifth Amendment issues, that he *had* forwarded all pleadings and discovery to Mr. Greenberg, *and* that he had submitted an Offer to the IRS. Nevertheless, the District Court concluded that "Defendant's actions throughout this litigation demonstrate that his failure to answer is not excused by a credible, good faith explanation."

The District Court also concluded that Mr. Scharringhausen was culpable because by the time he had submitted the offer, May 19, 2003, he had already defaulted. This is incorrect because the Request for Entry of default was not made by the government until July 3, 2003, which was 52 days after the government could have filed a request for entry of default.

In a seeming "catch-all" for why the District Court found that Mr. Scharringhausen's failure to bring the motion for relief until eleven months after it was entered was further evidence of bad faith, the District Court concluded that Mr. Scharringhausen had exhibited a lack of diligence. However, the record shows that Mr. Scharringhausen was not aware of the extent of the misunderstanding between himself and Mr. Greenberg until April 2004.

In fact the record in this case does not show Mr. Scharringhausen as dilatory. The default judgment resulted from a mistake and the explanations offered were disregarded by the District Court with circular logic and reference to Mr. Scharringhausen's prior litigation. The district court concluded the neglect that lead to the default was inexcusable because it was inexcusable!

Despite the fact that there was an explanation for the failure to respond to a complaint, the District Court dismissed it after the fact. Mr. Scharringhausen was told that there was nothing he could do in response to the complaint. Had Mr. Greenberg told him he had to file an answer there is nothing in the record to suggest he would not have filed an answer. The explanation for the default is clearly inconsistent with a devious, deliberate, willful or bad faith failure to respond.

Despite the fact that Mr. Scharringhausen presented an explanation for why the complaint went unanswered the District Court concluded that Mr. Scharringhausen's claim that he would have appeared to oppose the default judgment motion if he had proper notice of the second hearing, "specious when he failed to respond to the complaint, the request for entry of default, the government's first default judgment motion, or the government's post-judgment discovery requests."

Neither the record nor the law support the district Court's conclusion. On a Rule 60(b) motion the Court is *required* to "accept as true the movant's factual allegations." *Cassidy v. Tenorio* 856 F.2d 1412 (9th Cir 1988) (Citing *Falk v. Allen* 739 F.2d 461, 464 (9th Cir. 1984) (Per Curiam)). Deciding that the explanation was specious means that the factual allegations were not accepted as true.

The District Court needed to look no further than the declaration of Mr. Greenberg for a credible explanation for why the default occurred.

> I declare that, had Scharringhausen not have misunderstood my advice, he would have answered all pleadings, correspondence and communications from Attorney Schrock without hesitation because that has been his wish all along—to answer all allegations made against him. . . . he is a fighter and would not simply ignore a legal process.

The conflict amongst the circuits is also shown by *Pelican Production Corp. v. Marino*, 893 F.2d 1143. 1147 where the 10th Circuit stated that where a party claims his attorney was in error, "We believe a most obvious void exists where a party claims that its counsel's activities were not its own, but fails to demonstrate to the court any effort to produce explanation from its former counsel for his conduct." Having done exactly what the court in the Tenth Circuit advised, it was useless in the Ninth Circuit.

CONCLUSION

It bears repeating that the IRS has a history of taxpayer abuse and documented "institutional tendencies" which linger today that can lead to a "death by a thousand cuts" when the focus of tax administration is more on enforcement than in helping taxpayers become or remain in compliance with tax laws.

Here, the IRS received an Offer in Compromise from a taxpayer, who although convicted of bankruptcy fraud in 1996 has been attempting to utilize the avenues available to every taxpayer to resolve tax disputes to no avail. Despite evidence explaining the reasons why an answer to the complaint had not been filed, neither the District Court, nor the Court of Appeal, reviewed the law or the facts of this case, in part it appears because of the nature of the legal factors adopted by the Ninth Circuit.

Circular logic in the analysis of "excusable neglect" shows that Courts are taking widely divergent views of what constitutes grounds for relief, despite the Supreme Court's decision in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. P'ship*, 507 U.S. 380, 403 (1993).

Over the course of several months the IRS never told the taxpayer to contact the DOJ about any offer to settle. Rather the IRS sat on the offer until after a default had been entered

and returned it with nothing more than a form letter indicating that "other investigations were pending."

Only through a Freedom of Information Act request, after an appeal to the Ninth Circuit had been filed did it come to light that neither the IRS, nor the DOJ had any evidence to support any of the allegations, at least as to one of the tax years that were the subject of the complaint and almost half of the $488,307.96, default judgment.

In a prove up hearing on the default judgment the District Court failed to required the DOJ to provide the foundation for the claimed assessments and failed to require proof that notice and demand for payment had been made. The court also failed to require the DOJ present the foundation for the claim that the taxpayer was in fact a "responsible" person who 'willfully" failed to pay over federal employment taxes.

Despite the fact that the taxpayer provided an explanation, and legal and factual grounds in support for his motion to set aside the default judgment both the Court of Appeal upheld the granting of the default judgment, which it is said should only be granted in "extreme circumstances." Clearly there is a disjunction between the facts and the law as shown in this case and other circuits where "willfulness" is determined by varying and circular degrees of logic.

Based of all of the preceding, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 2007

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE NO: 03-CV-0551 W(RBB)

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT M. SCHARRINGHAUSEN,
Defendant.

January 7, 2005, Decided
January 5, 2005, Filed

ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT

OPINION BY Hon. THOMAS J. WHELAN, United States District Court.

Presently before the Court is Defendant's Rule 60(b) motion to set aside the Court's default judgment entered on November 6, 2003. Plaintiff timely opposed. All parties are represented by counsel. The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d.1).

I. BACKGROUND

On March 23, 2003 the United States commenced this tax assessment action against Defendant seeking to collect federal income tax liabilities for the 1991 and 1992 tax years as well as trust fund recovery penalty assessments pursuant

to 26 U.S.C. 6672. On April 11, 2003 the summons and a copy of the complaint were personally served on Defendant. Defendant did not timely answer the complaint or request an extension of time to do so.

On July 3, 2003 the government obtained an entry of default against Defendant. On November 6, 2003 the Court granted a default judgment against Defendant. Defendant has acknowledged receiving the original summons and complaint, the government's request for default entry and the government's default judgment motion.

On December 1, 2003 the government served post-judgment discovery requests on Defendant. Defendant failed to respond in any way to the requests. On March 11, 2004 the government moved to compel Defendant's response to its discovery requests. After an April 19, 2004 hearing, at which Defendant appeared for the first time, the Court granted the government's motion to compel and awarded the government costs associated with bringing the motion. On July 9, 2004 Defendant responded to the government's post-judgment discovery requests by asserting his Fifth Amendment right against self-incrimination and refusing to answer nearly all of the discovery requests.

On September 20, 2004 United States Magistrate Judge Ruben B. Brooks conducted a hearing on the validity of Defendant's blanket Fifth Amendment assertions regarding the discovery requests. Magistrate Judge Brooks ruled that the Fifth Amendment excused Defendant from responding to only a small number of requests and ordered that Defendant respond to the remaining requests no later than October 20, 2004.

Instead of responding to the requests, Defendant filed an October 12, 2004 declaration asking the Court to stay the September 20 order, toll the time for appeal, and prevent the government from enforcing the judgment against Defendant.

By order dated October 18, 2004 Magistrate Judge Brooks denied Defendant's request.

On October 19, 2004 Defendant filed a motion to stay with the Ninth Circuit, which promptly denied Defendant's request for lack of appellate jurisdiction the following day. On October 22, 2004 Defendant filed an *ex parte* application seeking a stay of Magistrate Judge Brook's order based on lack of "magisterial jurisdiction" and improper application of Fifth Amendment standards. Defendant also sought to stay all other post-judgment efforts to enforce the November 6, 2003 default judgment until the Court ruled on its propriety.

On November 4, 2004 the Court *sua sponte* tolled the Rule 60(b) motion filing deadline. Shortly thereafter, the Court denied Defendant's *ex parte* request and ordered that any motion to set aside the default judgment be filed no later than November 29, 2004. On November 29, 2004 Defendant filled this Rule 60(b) motion seeking relief from the default judgment entered in favor of the United States on November 6, 2003. Plaintiff timely opposed. For the reasons set forth below, the Court DENIES Defendant's request for Rule 60(b) relief.

II. LEGAL STANDARD

Motions to vacate default judgments are governed by Rule 60(b) of the Federal Rules of Civil Procedure. Subsection (b)(1) grants district courts discretion to relieve a party from a judgment or order for reason of "mistake, inadvertence, surprise, or excusable neglect," provided that the party moves for such relief within one year. *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695 (9th Cir. 2001).

III. DISCUSSION

In weighing Defendant's motion to set aside entry of default judgment, the Court must examine three factors: (1) whether Defendant's culpable conduct led to the default,

(2) whether Defendant has a meritorious defense and (3) whether reopening the default judgment would prejudice Plaintiff. *TCI Group Life Ins. Plan*, 244 F.3d at 696; *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). "This tripartite test is disjunctive. Hence, a finding that the plaintiff will be prejudiced, or that the defendant lacks a meritorious defense, or that the defendant's own culpable conduct prompted the default is sufficient to justify the district court's refusal to vacate a default judgment," *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988) (emphasis in original). As with any motion brought under Rule 60(b), the party seeking to vacate a default judgment bears the burden of demonstrating that the aforementioned factors favor vacating the judgment. *Cassidy*, 856 F.2d at 1415.

A. DEPENDANT'S CULPABLE CONDUCT REQUIRES DENIAL OF RULE 60(B) RELIEF.

Defendant contends that his conduct is excusable rather than culpable because he "has never once tried to manipulate the legal process to avoid addressing the merits of this dispute." Defendant's Motion at 9. The crux of Defendant's assertion is that he retained a tax attorney who mistakenly advised him that there was nothing he could do about the lawsuit because it was merely the government's way of continuing to try and collect the amounts Defendant allegedly owed in outstanding assessments.[1] Defendant's Motion at 10. According to Defendant, he believed that an offer in compromise made directly to the Internal Revenue Service in May of 2003 was a sufficient response to the summons and complaint. Defendant's Motion at 11. Defendant claims that his reliance on his attorney's mistaken advice excuses his

[1] It is unclear from Defendant's motion whether his claim is that his lawyer provided him with inaccurate advice, that he misunderstood his lawyer's advice or both. Since the Court's analysis is the same in either situation, the Court need not resolve the issue.

failure to timely answer the summons and complaint. The Court disagrees.

The Ninth Circuit defines culpable conduct for Rule 60(b) purposes as conduct for which "there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond." *TCI Group Life Ins. Plan*, 244 F.3d at 698. As the Ninth Circuit explained:

> Neglectful failure, to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process is not intentional under our default cases, and is therefore not *necessarily*—although it certainly may be, once the equitable factors are considered—culpable or inexcusable.

Id. at 697-98. The Court finds that Defendant's default was due to his own culpable conduct.

Several factors support the Court's conclusion. As a threshold matter, even if taken as true, Defendant's claim that he relied on his attorney's mistaken advice does not allow him to escape the consequences of his default. It has long been the rule that litigants cannot avoid the consequences of their attorneys' acts or omissions. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."). Thus, Defendant's failure to answer is not excused by reliance on his attorney's advice.

In addition, Defendant's claim that he relied on his attorney's advice, in contravention of the express instructions in the summons stating that he had 20 days from the complaint's service to file a response in this Court, lacks credibility. Defendant's well-documented prior experience with

litigation in both the Federal and State court systems reveals Defendant's general familiarity with legal proceedings and an appreciation of the consequences of failing to answer the complaint. Plaintiffs Opposition at 6; see e.g. *Meadows v. Dominican Republic*, 817 F.2d 517, 522 (9th Cir. 1987) (holding that foreign defendants conduct was culpable where they were sufficiently experienced in American legal requirements to protect their interests); *TCI Group Life Ins. Plan*, 244 F.3d at 699 n. 6. In light of Defendant's extensive prior litigation experience, his contention that he relied on his attorney's mistaken advice (or misunderstood his attorney's advice) and believed that he need not file a response to the summons and complaint in this Court strains credulity.

Even if Defendant could not be bound by the acts of his attorney and his claim of mistaken/misunderstood attorney advice were credible, Defendant's contention that based on his lawyer's advice he believed this lawsuit was being addressed by the offer in compromise he made directly to the IRS is unavailing. It is undisputed that Defendant was personally served with the summons and complaint on April 11, 2003 making his responsive pleading due no later than May 1, 2003. According to Defendant, he submitted his offer in compromise to the IRS on May 19, 2003, eighteen days *after* his response to the complaint was due. See Defendant's Motion at 4. The fact that Defendant had *already* defaulted by the time he submitted his offer in compromise belies his claim that he thought the offer in compromise satisfied his obligation to respond to this lawsuit. Even if Defendant truly did believe his offer in compromise was the proper response to the summons and complaint, he has provided the Court with no explanation for why it too was late.

Finally, Defendant's actions throughout this litigation demonstrate that his failure to answer is not excused by a credible, good faith explanation. See *TCI Group Ins. Plan*, 244 F.3d at 698-99 (noting that courts have examined a litigant's dili-

gence throughout the litigation in determining whether default was excused by a good faith explanation). Defendant did not appear in this action until nearly a year after the government served it despite his undisputed receipt of the summons and complaint on April 11, 2003, the government's motion for the entry of default and motion for default judgment. Moreover, when Defendant did finally appear in this action it was not to move to set aside the default judgment entered on November 6, 2003 but rather to oppose the government's motion to compel responses to its post-judgment discovery requests—requests to which the Defendant had failed to respond in any way.

Indeed, Defendant waited over eleven months after the November 6, 2003 default judgment to even address it and then did so via an *ex parte* application seeking to stay the government's post-judgment enforcement efforts. Although the Court extended the time period in which Defendant could file a properly noticed Rule 60(b) motion to set aside the default judgment, the Court made clear in its order that Defendant's conduct in defending this action has not been diligent. See November 12, 2004 Order at 4 (Doc. No. 68-1) ("Defendant's continued lack of diligence in defending this action further compels this Court to conclude that it shall decline Defendant's request for a stay in post-judgment enforcement efforts.").

Taken together, Defendant's actions in defending this lawsuit and his explanation for those actions, when one was offered, demonstrate that the default resulted from his culpable conduct. See *Meadows*, 817 F.2d at 522 (defendants, the Dominican Republic and a Dominican public housing agency, were culpable in not answering the complaint because they were "aware of the relevant federal law, . . . fully informed of the legal consequences of failing to respond, . . . and sufficiently sophisticated and experienced in the requirements of American law to protect [their] interests"); *Direct Mail*

Specialists, Inc. v. Eclat Computerized Tech., Inc., 840 F.2d 685, 690 (9th Cir. 1988) (defendant was "a lawyer, presumably . . . well aware of the dangers of ignoring service of process"); *Benny v. Pipes*, 799 F.2d 489, 494 (9th Cir. 1986) (defendants' failure to answer complaint was culpable when defendants had first filed motions to extend their time to answer, indicating an ability to deal with legal requirements)). Accordingly, on this ground alone the Court denies Defendant's motion for Rule 60(b) relief. See *Cassidy*, 856 F.2d at 1415.

B. DEFENDANT HAS FAILED TO PRESENT SPECIFIC FACTS THAT WOULD CONSTITUTE A DEFENSE.

Although the Court need not reach the remaining factors in the Rule 60(b) analysis because the Court has concluded that Defendant's failure to act was culpable, Defendant has likewise failed to present specific facts that would constitute a defense. See *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969) (holding that district court properly denied request to set aside default judgment based on defendant's general denial of liability). Defendant contends that he can assert a meritorious defense because the government (1) did not meet its burden of proof for the penalty assessments, (2) should be estopped from collecting in litigation what Defendant has offered to compromise and (3) violated Defendant's due process rights by failing to provide him proper notice of the motion for the entry of default.

1. Penalty Assessments

In this action the government seeks to collect trust fund recovery penalties assessed against Defendant pursuant to 26 U.S.C. § 6672 for his alleged failure to properly collect account for and pay over to the United States income taxes withheld from employee paychecks for the 1990 and 1991 tax

years.[2] Although not heavy, the burden is on Defendant to produce specific facts supporting a defense to the government's claim. See *TCI Group Ins. Plan*, 244 F.3d at 700.

Defendant contends that the IRS Forms 4340, Certificates of Assessments and Payments ("Forms 4340") submitted by the government do not establish his liability for the trust fund recovery penalty assessments. Specifically, Defendant claims that the mere existence of the Forms 4340 does not establish the next logical inference required by section 6672, namely that Defendant was a "responsible person" who acted "willfully." See *Davis v. United States*, 961 F.2d 867, 869-70 (9th Cir. 1992).[3]

In tax assessment cases, the government bears the initial burden of proof. *Palmer v. IRS*, 116 F.3d 1309, 1312 (9th Cir. 1997). The government can carry Its initial burden by the introduction of Forms 4340. See *Koff v. United States*, 3 F.3d 1297, 1298 (9th Cir. 1993) ("Certificates of Assessments and Payments are probative evidence in and of themselves and, in the absence of contrary evidence, are sufficient to establish that . . . assessments were properly made."); *Hughes v. United States*, 953 F.2d 531, 535 (9th Cir. 1992). Forms 4340 are admissible as self-authenticating official records. *Hughes*, 953 F.2d at 540.

IRS deficiency determinations and assessments are generally entitled to a presumption of correctness. *Palmer*, 116 F.3d at 1312. "[This] presumption shifts the burden of proof

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[2] Notably, Defendant does not discuss his federal income tax liabilities for the 1991 and 1992 tax years, which are also part of this action. Accordingly, the Court finds that Defendant has conceded that he cannot assert a meritorious defense to these assessments.

[3] Although Defendant also contends that there are "mistakes" in the IRS record as to the trust fund recovery penalties consisting of duplicative tax liens, he does not challenge the accuracy of liabilities themselves or the timeliness of their assessment. Thus, these arguments do not support a conclusion that Rule 60(b) relief is warranted.

to the taxpayers to show that the determination is incorrect." *Id.* Thus, after the government establishes its *prima facie* case by introducing deficiency determinations and assessments, Defendant must show that the government's assessment was incorrect by either establishing that he was not a responsible person under the statute or that he did not willfully fail to pay the amounts due to the IRS. *Palmer*, 116 F.3d at 1312; *Davis*, 961 F.2d at 869-70.

Here, Defendant does not dispute that the United States submitted proper Forms 4340 with its second motion for default judgment, which the Court granted in November of 2003.[4] See Declaration of Norma J. Schrock, submitted in support of the United States' Second Motion for Entry of Default Judgment, Exhibits CD (Doc. No. 11-1). These forms contain entries which show that the penalties at issue in this action were duly assessed and recorded and that notice was provided to Defendant. See *id.* As these assessments are entitled to a presumption of correctness, the government has carried its burden of proof and the burden shifts to Defendant. *Palmer*, 116 F.3d at 1312.

Defendant has provided no facts suggesting that he can carry his burden to show that the assessments were improper. The only facts that Defendant has provided are bald assertions that the Forms 4340 submitted by the government, by themselves, do not prove his liability for the penalty assessments. Instead of producing facts that affirmatively demonstrate that he is not liable for the penalty assessment, Defendant has chosen to rely solely on attacks directed at the

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[4] The Court finds Defendant's argument regarding the improper Forms 4340 the United States submitted with its original motion for default judgment utterly irrelevant. The Court's November 6, 2003 order granting the United States a default judgment was founded on the Forms 4340 submitted by the United States in connection with its second motion for default judgment, which Defendant does not dispute were proper, not the forms submitted with the government's original motion.

sufficiency of the government's evidence. However, because Defendant does not dispute that the Forms 4340 submitted by the United States are proper, they are entitled to a presumption of correctness and the Court concludes that they satisfy the government's initial burden of proof. Thus, Defendant's broad denial of the Forms 4340's sufficiency does not demonstrate that he has a meritorious defense to the trust fund recovery penalty assessments at issue in this action. See *Madsen*, 419 F.2d at 6.

2. Estoppel Based on Defendant's Submission of an Offer in Compromise to the IRS

Defendant next contends that the government should be estopped because of the government's alleged misconduct in connection with his offer in compromise to the IRS. However, Defendant has failed to provide any facts which support a meritorious estoppel defense.

In addition to the normal estoppel factors, a party seeking to estop the government must demonstrate that (1) the government has engaged in affirmative misconduct going beyond mere negligence; and (2) the government's act will cause serious injustice and the imposition of estoppel will not unduly harm the public interest. *Pauly v. U.S. Dept of Ag.*, 348 F.3d 1143, 1149 (9th Cir. 2003). Although Defendant alleges a number of facts which he claims demonstrate the government's affirmative misconduct, he does not explain *why* the government's alleged actions amount to misconduct, let alone misconduct "beyond mere negligence." *Id.* (alleged government misrepresentations insufficient to show affirmative misconduct beyond negligence absent allegations that the misrepresentations were deliberate or fraudulent). Nor does Defendant provide any specific facts supporting a conclusion that the government's alleged acts of misconduct will cause "serious injustice." Accordingly, the Court concludes that Defendant has failed to present specific facts supporting a meritorious estoppel defense.

3. Defendant's Due Process Defense is Meritless.

Defendant's final claim that the default judgment should be set aside because the government allegedly failed to notify him that the hearing date for the United States' second default judgment motion had been changed is entirely without merit. Since Defendant had not yet appeared in this action at the time the government brought its second default judgment motion, he was not entitled to notice. See FED. R. CIV. P. 55(b)(2) (requiring notice of a default judgment motion only if the party has appeared in the action). Nevertheless, the government served Defendant with an amended notice for its second motion for default judgment containing the new hearing date via U.S. Mail on October 20, 2003. See Declaration of Jeremy N. Hendon, Ex. A.

Even if Defendant did not have proper notice of the hearing date, the Court finds Defendant's claim that he would have appeared to oppose the default judgment motion specious when he failed to respond to the complaint, the request for entry of default, the government's first default judgment motion or the government's post-judgment discovery requests. Thus, the Court concludes that Defendant has not asserted any specific facts supporting his alleged due process defense.

As discussed above, the Court finds that Defendant has failed to assert any specific facts supporting a meritorious defense to this tax assessment action. Accordingly, this factor also supports denial of Defendant's request for Rule 60(b) relief.

C. THE UNITED STATES WOULD BE PREJUDICED BY REOPENING THIS ACTION.

Finally, reopening the default judgment could prejudice the United States. *TCI Group Life Ins. Plan*, 244 F.3d at 701. "To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case." *Id.*

If a delay will result in "tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion" the delay is considered prejudicial. *Id.* quoting *Thompson v. American Home Assurance Co.*, 95 F.3d 429, 433-34 (6th Cir. 1996).

The government has received evidence through its Offshore Credit Card Project that Defendant may be concealing assets and income in offshore jurisdictions as well as hiding and moving assets around. See Declaration of IRS Revenue Agent Huong T. Phan, filed in Case No. 02-CV2076 H(LAB), attached to Defendant's Notice of Lodgement of Motion to Set Aside November 6, 2003 Default Judgment (Doc. No. 76-1). Thus, the delay resulting from reopening this action would prejudice the United States by providing Defendant with a greater opportunity to conceal assets in an attempt to avoid his tax liabilities, a process in which Defendant may already be engaged.

Although Defendant belatedly filed evidentiary objections to some of the statements in Ms. Phan's declaration, Defendant can hardly be heard to complain about the admissibility of evidence be submitted in support of his motion to set aside the Court's default judgment. In addition, Defendant's claim that the government's delay in bringing this action to reduce Defendant's tax liabilities to a judgment demonstrates that the government does not have a legitimate fear that he is indeed concealing assets is without merit. Defendant has more incentive now, after having default judgment entered, than ever to conceal assets in an attempt to avoid his tax liabilities. Accordingly, the Court concludes that denial of Rule 60(b) relief is warranted to prevent the government from being prejudiced by any further delay in this action.

IV. CONCLUSION AND ORDER

In light of the foregoing, the Court DENIES Defendant's Rule 60(b) motion to set aside entry of default judgment. (Doc. No. 69-1.) This case shall remain closed.

IT IS SO ORDERED.

DATE: January 7, 2005

/s/ Hon. Thomas J. Whelan
THOMAS J. WHELAN
United States District Court
Southern District of California

APPENDIX B

UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 03-CV-0551-K (RBB)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT MICHAEL "BUZZ" SCHARRINGHAUSEN,
Defendant.

November 4, 2003, Decided
November 4, 2003, Filed

ORDER GRANTING PLAINTIFF'S MOTION
FOR ENTRY OF DEFAULT JUDGMENT

OPINION BY Judge Judith N. Keep, United States District Judge.

Presently before the court is plaintiff the United States of America's motion for entry of default judgment, filed on October 21, 2003. Defendant Robert Michael "Buzz" Scharringhausen has not filed an opposition to the motion for entry of default judgment. Plaintiff is represented by counsel. Defendant has not yet appeared before the court in this action.

I. Discussion

A. Legal Standard

Under Rule 55 of the Federal Rules of Civil Procedure, a court may enter judgment by default. See F.R.C.P. 55(b)(2). The Ninth Circuit has stated that when "exercising discre-

tion as to the entry of a default judgment," district courts may consider the following factors: "(1) the possibility of prejudice to the plaintiff[;] (2) the merits of the plaintiff's substantive claim[;] (3) the sufficiency of the complaint[;] (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect[;] and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th Cir. 1986) (citations omitted).

B. Analysis

Plaintiff asks this court to enter default judgment in favor of itself, the government, and against defendant Scharringhausen in the amount of $ 488,307.96, together with interest calculated from November 1, 2003. See Second motion for entry of default judgment at 5. According to the government, $ 488,307.96 constitutes the total amount of taxes, penalties, and interest that defendant owes to the United States as of October 31, 2003. See *id.* The following chart explicates the breakdown of monies allegedly owed by defendant to the United States:

Tax Period	Tax Type	Total Assessed	Interest Accrued	Penalty Accrued	Total Due
1991	income	8,307.85	9,950.26	884.43	19,142.54
1992	income	1,529.15	433.84	171.50	2,134.49
12/31/90	trust fund	146,579.89	185,657.15	0.00	332,236.61
9/30/91	trust fund	59,469.89	75,324.43	0.00	134,794.32
	TOTALS	215,886.35	271,365.68	1,055.93	488,307.96

Id.

The government previously moved for entry of default judgment, which this court denied without prejudice in an order dated September 23, 2003. At that point, the court could not enter default for the amount requested because the gov-

ernment failed to provide documentation regarding accruals for 1991 and 1992 or documentation of the trust fund tax and interest assessments and accruals for 12/31/90 and 9/30/91. Essentially, this court found that plaintiff's exhibits were insufficient in documenting plaintiff's default judgment request.

The government has rectified this concern in its second motion for entry of default judgment. Attached to the second motion are Certificates of Assessments and Payments (Form 4340's) for income assessments made in 1991 and 1992 as well as trust fund recovery penalties made in 1990 and 1991. See Decl. of Norma Schrock, Ex, A-D. These also show the interest and penalty assessed for all relevant time periods. The government also provided adequate documentation regarding the accrual of interest and penalties both for the income tax and trust fund recovery penalties by providing the computation tables used to formulate the amount.

The government has thus provided sufficient documentation of: (1) the money at stake and (2) continual service and notification to Defendant (both of this suit and of his tax liabilities over the years). This documentation demonstrates the merits of Plaintiffs claim and makes the possibility of any dispute concerning material facts negligible, at best. There is no reason for this court to believe that Defendant's default is to excusable neglect. For these reasons, this court GRANTS Plaintiff's motion for entry of default judgment.

II. Conclusion

For the foregoing reasons, the court GRANTS the United States' motion for default judgment in the total amount of $488,307.96, together with interest, determined in accordance with the laws of the United States, from the date of November 1, 2003. This court hereby ORDERS the clerk of the court to enter a judgment by default against the Defendants in accordance with this order, as allowed by Fed. Rule Civ. P. 55.

IT IS SO ORDERED.

Date: 11/4/03

/s/ Judge Judith N. Keep
JUDITH N. KEEP
United States District Court
Southern District of California

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed MAR. 7, 2007]

No. 05-55361
D.C. No. CV-03-00551-TJW/RBB
MEMORANDUM *

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT MICHAEL SCHARRINGHAUSEN,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Submitted February 12, 2007 **
Pasadena, California

Before: CANBY and THOMAS, *Circuit Judges*, and CONLON,*** *District Judge.*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2).

*** The Honorable Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Robert Scharringhausen appeals the district court's denial of his motion to set aside default judgment in this tax collection suit. Because the parties are familiar with the factual and procedural history of the case, we need not restate it here.

A district court has discretion to set aside default judgments in cases of "mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b). Three factors are central to the analysis: (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense; and (3) whether the reopening of the default judgment would prejudice the plaintiff. *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984); *see also TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). Accepting Scharringhausen's allegations as true, the district court found each factor weighed against vacating the default. Denial of a Rule 60(b) motion is reviewed for abuse of discretion. *Bateman v. U.S. Postal Servs.*, 231 F.3d 1220, 1223 (9th Cir. 2000); *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996).

Scharringhausen failed to take any action in this collection suit until more than a year after default was entered. The record supports the district court's finding that he ignored a personally-served complaint and numerous motions, hearing notices, discovery requests, and court orders. After considering Scharringhausen's extensive litigation experience, the district court reasonably rejected the contention that his undue delay should be excused because he relied on incorrect legal advice that no response to the lawsuit was required.

Nor did Scharringhausen proffer a meritorious defense. *TCI Group*, 244 F.3d at 700. He asserted an estoppel defense, but be did not offer any evidence of government misconduct. *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1149 (9th Cir. 2003). His due process argument failed because he did not file an appearance and therefore was not entitled to notice of

the default judgment. *Civic Ctr. Square, Inc. v. Ford (In re Roxford Foods Inc.*, 12 F.3d 875, 879 (9th Cir. 1993).

In light of information that Scharringhausen might be concealing assets, the district court concluded that reopening the case would cause further delay and could prejudice the United States in collecting taxes from him.

Denial of the Rule 60(b) motion was not an abuse of discretion.

AFFIRMED.

APPENDIX D

Federal Rule of Civil Procedure 55. Default

(a) Entry.

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment.

Judgment by default may be entered as follows:

(1) By the Clerk.

When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the Court.

In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter,

the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default.

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants.

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the United States.

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Federal Rule of Civil Procedure 60.
Relief from Judgment or Order

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to

grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §§ 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.